Office of Legislative Legal Services

Colorado General Assembly

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Assistant Directors
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Bart W. Miller
Julie A. Pelegrin

Publications Coordinator
Kathy Zambrano

Colorado State Capitol
200 East Colfax Avenue Suite 091
Denver, Colorado 80203-1716
Tel: 303-866-2045 Fax: 303-866-4157
Email: olls.ga@state.co.us

Managing Senior Attorneys
Jeremiah B. Barry
Christine B. Chase
Michael J. Dohr
Gregg W. Fraser
Duane H. Gall
Jason Gelender
Robert S. Lackner
Thomas Morris

Senior Attorneys
Brita Darling
Edward A. DeCecco
Kristen J. Forrestal
Kate Meyer
Nicole H. Myers
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Richard Sweetman
Esther van Mourik

Senior Attorney for Annotations
Michele D. Brown

Staff Attorneys
Jennifer A. Berman
Yelana Love

SUMMARY OF MEETING

COMMITTEE ON LEGAL SERVICES

April 20, 2016

The Committee on Legal Services met on Wednesday, April 20, 2016, at 7:36 a.m. in HCR 0112. The following members were present:

Representative Foote, Chair
Representative Dore (present at 8:14 a.m.)
Representative Kagan
Representative McCann
Representative Willett
Senator Johnston (present at 7:50 a.m.)
Senator Roberts
Senator Scheffel, Vice-chair
Senator Scott
Senator Steadman

Representative Foote called the meeting to order. He said we have two main things on the agenda. The first is we'll be sitting as the Committee on Legal Services to discuss the Secretary of State's Rule 11.9. I'll call up Ms. Meyer first and then we'll call up members of the public who have signed up to testify. We'll make a decision about what to do or not to do on that particular rule. Then we'll move into sitting as the committee of reference on House Bill 16-1257 and decide what to do on that.

7:38 a.m. – Kate Meyer, Senior Attorney, Office of Legislative Legal Services, addressed agenda item 1a – Rule 11.9 of the Secretary of State, Department of State, concerning purchases and contracts of electromechanical or electronic voting system, devices, or related components, 8 CCR 1505-1 (LLS Docket No. 160146; SOS Tracking No. 2015-00846).

Ms. Meyer said I am here to present Rule 11.9 of rules of the Secretary of State's office concerning elections. Like the previous rule issue heard by this Committee this session, this is an out-of-cycle rule review of a rule promulgated on February 9, 2016. This is a portion of a larger set of election rules. Rule 11.9 specifically concerns purchases and contracts. Those are purchases of and contracts for electronic and electromechanical voting systems for use in the state. Those terms are defined for the Uniform Election Code of 1992. Those definitions are excerpted in footnotes 3 and 4 of your rule review memo on page 2. Briefly, an electronic voting system is a touch screen device-based system, an electromechanical voting system, that allows a ballot card to be used by an elector which card is then electronically tabulated. While counties and other political subdivisions conducting elections across the state actually acquire these voting systems, the Secretary of State's office is statutorily vested with some gate keeping functions with respect to those transactions. In the first instance the Secretary of State's office certifies voting systems for use in the state and in the second, the Secretary of State receives applications from political subdivisions for use of voting systems. Rule 11.9 is promulgated pursuant to that later function. The rule-making authority for Rule 11.9 is excerpted on page 4 of your memo. It's section 1-5-613 (1), C.R.S., and that provision states that the Secretary of State shall adopt uniform rules in accordance with the Administrative Procedures Act (APA), article 4 of title 24, C.R.S., for the purchase and sale of voting equipment in the state. It's a fairly broad grant of rule-making authority that the Secretary of State enjoys with respect to these transactions. With that broad grant of rule-making authority in mind, Rule 11.9 is a pretty comprehensive set of instructions, criteria, and mandatory features that voting systems must possess in order for an acquisition application of such voting systems to be approved by the Secretary of State's office. While Rule 11.9, which is excerpted as Addendum A of your memo, is pretty comprehensive and fairly prescriptive, the Office of Legislative Legal Services (Office) sees nothing in there that conflicts with any applicable law or exceeds that broad grant of rule-making authority. We therefore believe that the rule passes rule review muster and we are recommending the Committee take no action.

Representative McCann asked reading Rule 11.9, am I correct that the way it's drafted it would only cover one of the vendors that has applied to have the contract. Ms. Meyer said it's my understanding that that is how it works in the

real world, although there's nothing apparent from the face of the rule that would indicate that it only applies to one vendor currently. Representative McCann asked have you had occasion to read the opinion that we received from Halpern Meacham law firm. Ms. Meyer said I did receive that last week when the members of the Committee also saw it. Representative McCann said the conclusion in that opinion is that this rule conflicts with the federal Help America Vote Act of 2002 (HAVA) and Election Assistance Commission (EAC) standards. I must admit, I couldn't figure out where the conflict was based on this opinion. I just wondered what your thoughts were about that opinion. Ms. Meyer said I share your assessment of that opinion. With all respect to Madeline Meacham who prepared the commentary based on HAVA, I didn't see an actual conflict with HAVA set forth in the opinion. I don't know if they're here to testify and maybe explicate further the conflict that they see. I don't want to make any assumptions on their behalf, but it seemed to me that perhaps the opinion was premised on the fact that because there's no explicit grant to state elections officials to promulgate rules such as Rule 11.9 that therefore such authority doesn't exist. Although in article 1.5 of title 1, C.R.S., there is another broad grant of rule-making authority to the Secretary of State's office to adopt rules necessary to implement HAVA. I believe that portion of the C.R.S. is excerpted in the Halpern Meacham memo. I'm not completely convinced that there is a conflict issue, but I think they would be better to ask about that.

7:43 a.m. – Suzanne Staiert, Deputy Secretary of State, Department of State, and Leeann Morrill, First Assistant Attorney General, Office of the Attorney General, testified before the Committee. Ms. Staiert said initially I was going to sign up for questions only and then I noted there were a number of people who signed up to testify. I wanted to point out a couple of things that have come up already, questions that have been asked by the Committee. First of all, the rule was not written so that only one vendor would qualify. We currently have applications in from four different vendors for certification. One has gone through the process and been approved. We anticipate there is another vendor that may qualify under these standards. I just wanted to set the record straight on that. Other than that I'm happy to answer any questions from the Committee. We have reviewed the letter and we agree with the Office. Ms. Morrill said I don't have anything to add. I'm here to support Ms. Staiert.

Representative Willett said I just want to echo the question of Representative McCann. Have you looked at the Halpern Meacham letter and do you see any problems that they've raised that remain problems in your mind or are you still firm in your opinion? Ms. Staiert said I think Ms. Meyer stated it well. We've all reviewed that letter and it indicates that there's a belief that we violated HAVA. A review of the letter looks like it's just a recitation of statutes and then a final

conclusion that says – and therefore they violated these statutes. In fact, HAVA requires that the chief election official of the state interpret the laws or pass rules in a way that makes elections uniform. So HAVA, if anything, puts more duties on the Secretary of State. It is the mechanism that requires the Secretary of State to be the one engaged in any litigation if there's an election issue as the chief election official. I think that their reading of HAVA is inaccurate. HAVA sets a base standard for what has to happen to get certified, as does the EAC. The EAC has minimum standards for certification, but nowhere does either of those say and then the state can't have additional ones. Colorado has a unique election model and the EAC and HAVA are setting standards for the country. We set additional standards for our election model which is much different than what you might see out on the east coast. We have an all-mail ballot system. In-person voting is not utilized to a large degree in Colorado. The issues that we have adopted recognize this unique system in Colorado. That's where our rule making came in in terms of this rule as well as our certification rule. There's nothing in HAVA that prevents that. I would say HAVA encourages that. Representative Willett asked does Ms. Morrill agree. Ms. Morrill said I do. Ms. Staiert said just for the record, we also have an opinion from the Attorney General's office approving the rule and I'm happy to have anybody take a look at that. They review all of our rules in addition to the Office and during this rule promulgation they were with us including the rule review hearing. The Solicitor General issues an official opinion approving the rule.

Senator Scheffel said there's been a lot of talk about the process of this and the result being a sole vendor. You're well aware of the function of this Committee and how the recommendation of staff is difficult to overcome, it's not usual, and yet I want for you to elaborate on the goal of the Secretary of State. Is it to have multiple vendors or we've heard that the rules were designed to isolate and have one vendor, but you said you anticipate having as many as two. If you could help us with the background and the goal of the Secretary of State, is the system and the rule making designed to foster an environment where there will be many vendors or is it a goal, and if it's legitimate goal the Secretary is pursuing help us understand that, to have it be a narrow field of vendors. Help us understand the goal of the Secretary in this process. Representative Foote said I think that's the question a lot of folks have although I'll try to keep us somewhat focused on what we do as a Committee which is making a determination about whether or not the rule fits under the statutory authority, but since that's been a topic I think we should go ahead and talk about it at this point. Ms. Staiert said this was a three-year process that started under Secretary Gessler to choose a vending system. Throughout the process we had open meetings. We had input from the clerks and input from county commissioners. They were actually on the board. There was a separate board made up of citizens and so they weren't necessarily involved in the election system that representatives from the parties

were. Out of that, they recommended that we pilot all of the systems that had come forward to the committee. I will say that throughout this process all of the vendors were supportive until choices were made. Everybody participated and we had a pilot over the last election and everybody was welcome to come in and participate. That was contingent on any of those vendors receiving temporary approval. None of the vendors that we're talking about are certified. None of them were certified during the last election. They were all temporarily approved. They didn't meet certification at that point. We hadn't done testing and they hadn't been through the EAC. We piloted those systems and in the pilot the committee members went out and did full analysis and thousands of collective hours were spent on this. When they came back from the pilot, the committee made a recommendation to the Secretary of State. If there was a single vendor to be chosen, they chose Dominion Voting Systems (Dominion) because of the way that they laid out for the mail ballot model. One example that we typically give is that we were really looking for vendors that used off the shelf equipment, high-speed scanners, so that we could do online adjudication. For instance, because we're a mail ballot state, those ballots come in and if you want to make them publicly available to people you really need to scan them in and then when you do adjudication it's much better to be able to do it on a screen and be able to change the ballot there instead of having to duplicate it. There are lots of examples about why the committee chose certain systems. When we did the rule making we took the criteria that the committee used and we put that in the rule for approval of the system. We didn't put in the rule you must pick this system or you must pick this system. We put in the rule those things that I've talked about like electronic adjudication. You must be able to do that. You must be able to not have to feed one ballot at a time on a table top scanner, things that make it more efficient. We did that for a couple of reasons. When you ask was it for convenience, I wouldn't say convenience as much as uniformity which is something that we strive to do in the Secretary of State's office and is actually written to statute. We're supposed to uniformly apply laws. We picked systems that we thought across the state would be better for a mail ballot model. We are encouraging the use of Dominion through the grant of HAVA funds. For anybody who switches over to Dominion in 2016 or 2017 we will pay half of their startup cost. That's how we are incentivizing Dominion. The reason that we're incentivizing is that throughout the years we've had issues in certain counties where, for example in Elbert County over a three-year period, they had a complete turnover twice of their entire elections department, including the clerk and the director. When we went down to run the Elbert County election a year and a half ago we had to go do it ourselves because they had a unique election model. They couldn't borrow equipment from Douglas County. They couldn't borrow staff from anybody. They had a system that was stand alone, theirs alone. So we had to go down and learn that system because they couldn't run that election. If the Secretary of State's office is going to be deployed

throughout the state, which frankly we are in every single election that I've ever been a part of, if we have to run an election and we don't know the system then we have to learn it. If we knew the system, we probably wouldn't have to go at all because other counties could chip in. They could borrow equipment and staff. It also makes us less reliant on vendors if the person who programs our system leaves a week before. We've had situations where then the vendor has to come in and that's a huge cost to the counties to bring those vendors in. There's been a lot of issues with uniformity. We had a lot of problems for example down in Saguache County. They had a system where they were tabulating in person on one vendor and scanning on another vendor then they were physically adding those numbers together on a calculator and in an election a couple of years ago they dropped 500 votes for a congressional candidate because they weren't using a system that was altogether certified. This mix and match that we have in Colorado has been very problematic. That's what we had in mind when we brought the group together. These are also very aging systems. They are not supported by Windows anymore and we needed to get to a new system in Colorado. Everybody bought equipment when HAVA money came out back in the 2000s and those systems are not useful anymore, especially not for a mail ballot model. They're set up for in person voting and they're not set up to tabulate quickly. Those were some of the thoughts we had. I'm sure there were other others.

When we did the rules we put down the things we thought needed to be done in order to promote this mail ballot system and modernize our processes. We didn't do it for a single system and in fact I think there is another system that is going to qualify, but we don't know because applications have been submitted for certification. One of the problems with what's happening today is people seem to be conflating this rule with the certification rule that exists in Rule 21. In order to even qualify to purchase you have to be certified. None of these systems are certified, but we're here today talking about a rule that has to do with purchasing. Nobody has asked to purchase anything that they've been denied. Nobody can purchase anything because nobody is certified except for Dominion right now and that's not because of us, that's because they haven't had their applications in long enough to go through that certification process. We don't even really know where everybody is going to end up. I think a lot of this is a bit premature, but to the extent people are not certified that's going to be because they don't meet the certification requirements in Rule 21. Talking about whether or not we're going to approve them is a bit like putting the cart before the horse. That's what the rules are based on. The purchase rules are based on certification. The certification rules are based on what we need in order to implement the mail ballot system in Colorado. I hope that answers the question about what our goals were and where we ended up.

Representative McCann asked when was Rule 21 adopted or passed. Ms. Staiert said Rule 21 has always existed. Certification standards have been in rules since that duty was given to the Secretary of State and it's required by HAVA for the state to go through certification. The new standards in Rule 21 were done at the same time as this rule. Representative McCann said it was a little unclear. You said none of these are certified and then you later said Dominion is certified, so Dominion is certified but none of the others are. Is that the situation? Ms. Staiert said none of the vendors who we've heard from who are unhappy with the process are certified. Dominion recently, I think in the last couple of weeks, maybe a month ago, received its certification. That's a long process. They go through the EAC or they can come directly to Colorado. I believe Dominion went through the EAC and then met the additional Colorado standards. The other three vendors all have applications in and they are in line for that process, but it's not complete. Representative McCann said Ms. Staiert you said no one has purchased the system yet, but if they're going to use it in the 2016 election do they have time to purchase a system now and get it set up. Or I guess some of them are piloting a system and they could use it if they've piloted it and it gets purchased. Or maybe I didn't understand what you meant by purchased. Ms. Staiert said my comment was that nobody has applied for approval of a purchase. This rule is based on statute that talks about how the Secretary must approve equipment. None of the vendors other than Dominion are certified so we haven't had any applications in to purchase their equipment because they're not certified, I would assume. I guess a county could apply but they would get denied because you can't use uncertified equipment in an election. Some counties have purchased Dominion. Some counties are leasing Dominion. We have given Jefferson County temporary approval again to use their elections system which is Elections Systems & Software (ES&S). Temporary approval only lasts for one year. The temporary approval we gave for the last election so everybody could pilot these systems that weren't certified has expired. We gave another temporary approval to Jefferson County so they will be using a different system. No one was required to purchase. Everybody who has preexisting equipment that wants to continue to use that, if that equipment was certified, which it all is in the state, they can continue to use that. All of the other counties who aren't switching to Dominion or aren't Jefferson County can continue to use their equipment that they have if they believe it's still useful and it's still certified. We're not mandating that everybody switch over, but when they do switch if they are going to upgrade to one of these new systems one of the new systems needs to qualify for certification and approval by the Secretary of State's office. Representative McCann said that's helpful to know. So no one is required to purchase equipment for this upcoming 2016 election, if I am correct, and if they do want to purchase equipment they can get money from the state either this year or 2017? Ms. Staiert said the HAVA money is for counties that are switching to Dominion. That's because we are incentivizing

that because it is our hope that many counties do. We know that it's a certified vendor now and it's helpful to us if we can help the counties. When they call for assistance and we can provide that because we have expertise in house it's helpful. We're actually going to have that system in the office too so we can walk people through it, test it, and get a little more training and expertise on Dominion. We can't do that now throughout the state. There are too many vendors and too many mixed and matched systems out there for us to become experts in all of them. But counties can continue to use them. The only county I would say is an exception to that is Jefferson County who didn't believe they could continue to use their old system because there was an issue with compliance of a portion of their system. They believe their old system could no longer be certified and so that's why they asked for temporary approval of the current ES&S system which is not certified and we granted that. Representative McCann said in the rule it does require that the system be able to export data from SCORE. Do all the counties use the SCORE system currently? Ms. Staiert said SCORE is our statewide voter registration database and because of the current model when a voter comes in to cast a vote that's real time uploaded into SCORE. Every county uses SCORE. There will be no other way for them to run an election. Sometimes they run an election outside of SCORE if it's a municipal election or something like that, but not for a statewide election.

Senator Scheffel said I think I hear you saying it, but I'd love to hear you say it. In the Secretary of State's exercise of the broad rule-making authority, is it the accurate position of the Secretary of State that uniformity is a legitimate interest and goal as part of the rule making as it is before us? Ms. Staiert said it is a legitimate goal and it's actually a legitimate goal because the legislature told us it was our goal when they said a goal of elections was uniformity. One of the criteria we have is to have the laws apply uniformly throughout the state and have the election processes uniformly throughout the state. We're in a very mobile population and people move county to county and we want that experience to be the same wherever you are. Senator Scheffel said let's make sure we know what we're talking about. When I'm talking about uniformity I'm talking about uniformity of systems. Not application of law, but uniformity of systems. In this case we're talking about Dominion. Then there's been some reference to some other vendors that may or may not be qualified. What I'm trying to drill down on is the Secretary of State's goal when it comes to uniformity. What I'm hearing is that in exercising the broad grant of authority, the uniformity of vendors is a goal of the Secretary of State. If you can help me understand to what extent is that uniformity. Is it one vendor, is it two? What's the goal of the Secretary here? Ms. Staiert said when we originally went in to the process we had in mind that there may be one vendor, there may be two, there may be a vendor that's better for large counties, and a vendor that's better for small counties. I think the Secretary of State's goal was to have a uniform

vendor so we could assist them and counties could loan equipment and we could cut down on the number of vendors throughout the state. I think whether that became one or two, it was probably never more than two that we had in mind that we wanted to have to become experts in. I think ultimately the Secretary of State's goal and probably more through the use of the HAVA dollars is to try to get one vendor. These rules don't really get us there. Do I think it's a legitimate goal? Absolutely. Do I think that's what these rules are about? Not necessarily. I just don't want to confuse the two. I don't want to be disingenuous and say that it's not the Secretary of State's goal because obviously he's incentivized it with these moneys for the counties to switch. I don't think he did it through these rules.

Representative McCann said I remember reading and I can't remember all the details, but there was something in the paper about Dominion either having some bankruptcy problems or some financial problems. Are you familiar with that at all and was that something that was taken into account when you were looking at these certification processes and the incentive process? Representative Foote said I think we are getting into the policy much more here which is part of the reason why I think it was right to refer this issue here because we can have this discussion better here than on the floor. I'll call on Ms. Staiert, but I want us to keep in mind that we want to discuss this to a certain extent but we don't want it to be another couple hours of policy given our time constraints. Ms. Staiert said finances were a criterion that we looked at. The committee did not look at it. Those were submitted confidentially and they were reviewed I think by our election team and maybe our finance team and chief of staff. I never saw the finances so I can't attest to that. I can tell you that it was a criterion. I think that if we become involved in litigation at some point down the road that may be something that comes out. At this point I can just say that we were satisfied that this was a vendor that had a long-term presence and was going to be able to service Colorado in the future.

8:10 a.m. – Merlin Klotz, Clerk and Recorder, Douglas County, and Christopher Pratt, Senior Assistant County Attorney, Douglas County, testified before the Committee. Mr. Klotz said I have the authority to fire my entire elections staff 8:00 a.m. on election day. I believe we would agree that would be poor judgement and in fact have major consequences to others. I have a friend who has the authority to withdraw all the funds from his family checking account and take a worldwide tour with his mistress. I think you'd probably agree that would be poor judgement and have negative impact on others, namely his wife and his kids. Similarly, the Secretary of State claims to have broad authority to force the Dominion election system on all 64 counties. I'll let Mr. Pratt speak to where that authority has limits. Whenever one has broad authority to act there is a responsibility to use judgement and act in a way that is

not self-serving and does not harm others. Any benefit to the Secretary of State derived from imposing a single Dominion election hardware/software system on all counties must be balanced with a financial and operational cost to the counties. In 2015, eight counties piloted a state of the art federally certified system of one of four vendors. Each of the systems met with rave reviews from the staffs that actually used the systems and each of the counties wanted to continue using those systems. Those not using the Dominion system were denied that option. Use of these pilot systems was observed by members of the Pilot Election Review Committee (PERC), a public committee organized by the Secretary of State. Colorado has 64 counties, half of which are less than 15,000 in population. Three have less than 1,000 in population. To force them all to use a system designed for the 680,000 population of Denver is analogous to getting my wife's foot into Cinderella's glass slipper. After selecting the Dominion system as the sole permissible elections system, the Secretary of State crafted these rules in an attempt to methodically eliminate all systems except the Dominion system. The Secretary of State could have saved several pages of rules simply by saying the name of the company has to begin with the letter "d" and end in "n". I'll address specifically Rules 11.9.3, 11.9.4, 11.9.5, and 21.4.16. They're essentially repetitious so a reference to one is the same as a reference to another. Rule 11.9.3 (a) will approve a political subdivision's application to purchase, lease, or use the voting system, device, or related equipment after considering all relevant factors including, without limitation, evaluation of the voting system performed by public committees organized by the Secretary of State and any recommendations regarding the use of the voting system by such public committees (i.e. PERC). PERC, organized by the Secretary of State, voted 5 to 2 that there should be more than one vendor, citing all the negatives of an unnecessary monopoly and that one size doesn't fit all. Thus the Secretary has failed to follow his own rule. Rule 11.9.3 (c) says a relevant factor is the voting system's utilization of commercial off-the-shelf hardware components rather than proprietary purpose built hardware components. This rule is specifically intended to eliminate ES&S whose system is based around a large, proprietary, extremely high-speed scanner. Personally for Douglas County I prefer the off-the-shelf Cannon equipment or Kodiak scanners used by the other pilot systems. However, Jefferson County with over 600,000 residents can justify two of the ES&S systems for speed while maintaining redundancy. Rule 11.9.3 (d) says a relevant factor is so that system users can operate or access all election management systems with a single interface on the same server or workstation. This rule is specifically intended to eliminate Hart InterCivic (Hart) who employs multiple, identical, interchangeable pieces for separate, unrelated functions. The Dominion system unnecessarily concentrates every function from ballot design and creation to scanning to resolution to counting on a single server. There's no operational reason for these functions to be on the same high-priced server. In fact, there are internal control and single point of failure

reasons why they should not be on the same server. Because the Dominion system with a single server is a single point of failure, large counties will be out for two high-priced servers. Hart on the other hand uses PCs that are interchangeable providing redundancy without extra cost for small, remote counties. Rule 11.9.3 (g) says a relevant factor is a system that efficiently support selections principally adjudicated by mail ballot in all political subdivisions regardless of their size, number of registered electors, or fiscal resources including applications enabling election judges to digitally rather than manually adjudicate and resolve ballots. If the voter has for example marked the ballot both Bennet and Buck in a Senate race but written in, torn, or otherwise identified his final choice an election judge is required to give credit to the voter's choice if it can be determined. Traditionally most systems address this by manually duplicating the ballot with only the voter's intended selections. Most new systems allow reconciliation to be done electronically, on screen, to the scanned image. Systems like Hart provide both options. While electronic adjudication equipment is efficient for larger counties it is an unnecessary cost for small counties that may have very few ballots to begin with. Rule 11.9.3 (g) (2) says that a relevant factor are ballot scanners equipped with automatic document feeders, enabling election judges to scan multiple ballots rather than a single ballot at a time. Much less expensive single ballot fed equipment meets the needs of smaller counties. What benefit, for example, would San Juan County, where there is a total population of 700, derive from an expensive Cannon scanner with automatic document feeding when all the ballots could be manually fed in an hour or two? As this rule provides no operational benefit and is an unnecessary added expense for smaller counties, the sole purpose of this rule appears to be to eliminate Hart who piloted an alternative sheet feed solution for smaller counties. Rule 11.9.3 (o) says that a relevant factor is that compliance with Colorado requires voter anonymity. Section 1-5-613 (1), C.R.S., says the Secretary of State shall not certify an electronic or electromechanical voting system unless such system provides for voter secrecy. The selected Dominion system fails both this statute and rule in that this system's polling place ballots are a different size than mail ballots. All newer systems are audited by an on-screen view of cast ballot images and those images are subject to CORA request. Because of the difference in size the polling place scanned ballot images can be readily identified and matched with poll books in low volume polling place elections. Unlike the Dominion system, Hart ballots are the same size ballot for both mail and polling place making it impossible for the Hart system to identify which ballots were polling place and which were mail ballots. The risk of lost confidentiality does not just apply to small counties. In the 2015 coordinated election Douglas County had only 805 polling place ballots and those were spread between 197 different precinct styles or an average of only four polling place ballots of any given style. Many were likely single ballots per style. Again this is relevant because today cast ballot images

and poll books are subject to CORA requests. Rule 11.9.3 (g) says that a relevant factor is a system that efficiently supports elections principally conducted by mail ballot, in all political subdivisions, regardless of size. Up until this point I've addressed the operational considerations. Since Rule 11.9.3 (g) says efficiently support elections, I want to consider several costs examples comparing the Dominion system to other systems. In Douglas County, the Dominion solution initial cost is estimated to be 87% higher than the Hart solution and the ten year cost of the Dominion solution is estimated to be 99% higher. This is $277,000 higher initially and $673,000 more expensive over ten years. In Garfield County, the Dominion solution initial cost is $240,000 or 92% higher compared to Hart at $125,000 and annual support costs are $30,000 compared to $22,000. Gilpin County election equipment was destroyed two years ago due to an electrical problem in their courthouse. In 2015 they piloted the Clear Ballot solution and desired to continue using it. However, due to this rule they were coerced into buying the Dominion system. Now with the expensive over capacity they can scan their entire 4,000 ballots in about 20 minutes. These rules represent an unnecessary overreach of the Secretary of State's authority as well as being contrary to HAVA rules as adopted under section 1-5-615, C.R.S., and thus should be void. As these rules were written after the selection of a favorite vendor with a sole objective to eliminate all but the selected election vendor they do not represent a good faith effort to select systems that best benefit all Colorado counties regardless of size. As a consequence, enforcement of these inappropriate rules has already and would continue to deprive Colorado counties of purchasing the most appropriate and fitting election hardware/software system for their individual needs. While many of the distinctions between the Dominion system and the other piloted systems may be subjective and have varied importance between counties the substantial cost difference between the two similar systems, Dominion and Hart, can only be viewed as an unfunded mandate on counties. Wide ranging authority granted to take an action comes with an expectation that related decisions are judicial and fairly treat all impacted parties. In this case, the subjective decisions behind these rules make a strong case that the good of all counties was not a consideration and the financial penalty on counties resulting from these rules make a hard case the single vendor decision was not made in good faith. These rules are a conclusion in search of a reason, to exist rather than the logical result of addressing a need. I ask that the Committee strike these rules as an overreach and unfunded mandate upon Colorado counties and as void and not in compliance with HAVA, a federal program from which Colorado has obtained millions of dollars. I further must ask is Colorado incurring a liability by using HAVA funds to entice counties to invest in equipment under a nonHAVA compliant program.

Mr. Pratt said you've heard some of the policy considerations by my colleague Mr. Klotz. I would like to address for you some of our legal concerns with these new rules. You have already heard that there is some concern of overreach here from the Secretary of State's office and while we agree with the conclusion of the Office that the Secretary of State's office has very broad authority to make rules regarding the approval or certification of electronic voting equipment, we feel that that analysis stops short of defining where those limits may be. The Office's analysis simply concludes that it is very broad and taken without context there is no limit. I would like to give you some of that context and those limitations as shown in the statutes. The first issue is this takes away the statutory right from local jurisdictions to select a voting system that meets their needs. If you look at section 1-5-603, C.R.S., the first sentence says the governing body of any political subdivision may adopt for use at elections any kind of voting machine fulfilling the requirements of voting machines set forth in this part 6. Clearly the intent was to give the discretion to the local jurisdictions that had to pay for these machines and have to use the machines to decide which machine best meets their needs. That sentiment is repeated in section 1-5-612 (1), C.R.S., the governing body of any political subdivision may, upon consultation with designated election official, adopt an electromechanical voting system including an upgrade in hardware, firmware, or software for use at the polling locations in the political subdivision. Once more we see it in section 1-5-616 (4), C.R.S., where at the very end it says systems are certified in a timely manner and are available for selection by the political subdivisions and meet user standards. Nowhere in this article will you find that authority with the Secretary of State's office. Nowhere in here does it say the Secretary of State may select the voting system for local jurisdictions to use but we've seen at least three times where it says local jurisdictions may. Second, this rule-making authority and this attempt to create a uniform voting system by the Secretary of State's office is not authorized. As we read the statutes the Secretary of State's office does not have discretion to refuse to certify a system that meets the requirements to conduct an election in Colorado. If you look again at section 1-5-608.5 (3), C.R.S., it says if the electronic or electromechanical voting systems tested pursuant to this section satisfy the requirements of this part 6 the Secretary of State shall certify such systems and approve the purchase, installation, and use of such systems by the political subdivisions and establish standards for certification. I don't see discretion written into that and again in section 1-5-616 (4), C.R.S., it says the Secretary of State shall adapt the standards for certification of electronic and electromechanical voting systems established by rule pursuant to subsection (1) of this section to ensure that new technologies that meet the requirements of such systems are certified in a timely manner. I don't see discretion there for the Secretary of State to decide which systems the local jurisdictions can use and yet the Secretary of State has interpreted the rules to give him just such authority. Finally, as far as what

authority the Secretary has, if we look again at section 1-5-616, C.R.S., the first subsection says the Secretary of State shall adopt rules in accordance with the APA that establish minimum standards for electronic and electromechanical voting system regarding…and then it gives a list of various criteria. Now what the Office and the Secretary of State have done is read minimum standards to say any standard that the Secretary of State sees fit to call a minimum standard. But I would suggest to you that a minimum standard is a standard below which a system may not function properly to conduct an election here in Colorado and any system that does not meet that minimum standard should not be certified by the Secretary of State and then should be forbidden for counties to purchase that system. That's a minimum standard as opposed to just a standard that the Secretary of State may set however he wishes. He may set a minimum standard. I think we've heard some criteria here in Mr. Klotz's testimony that some of these standards are not minimum standards. In fact, we know that four systems were piloted and all four systems successfully conducted an election here in Colorado and in fact the systems were so successful that all of those who piloted them wished to continue using then and yet in the rules as they are now the Secretary of State is willing to admit that maybe two of them would meet his new minimum standards. Standards that apparently go far above and beyond what is required to successfully conduct an election since all four were able to before. In essence, and I don't want to be flippant, this is the equivalent of saying everyone must buy a blue machine because that's what the Secretary of State prefers. He prefers blue machines and if you look at the proposed Rule 11.9 it says specifically the Secretary of State certified and selected the voting system as Colorado's uniform voting system on or after December 15, 2015. Clearly the intent was to create a uniform voting system that everyone will have to buy after December of last year, that was the intent that was proposed in the rule making and that all of us testified to. Now when we argued that's not fair and you can't tell us all we have to have a blue machine, what if we want the red or the green or the yellow, the Secretary of State rewrote the rules after the rule making was over so that those criteria, those particular characteristics of blue machines are the minimum standard. They're not saying you have to buy a blue machine, they're just saying any machine you buy has to act like a blue machine. The last legal point I'd like to make for you is that, and it was implied, what was proposed to the public under the APA rule-making authority for Rule 11.9 was the addition of two parts and the changing of the two subparts. The entire Rule 11.9 took up a half of a page. It was five parts with two subparts. That was what was proposed and that was what was discussed at the public hearing on the rule making. What was adopted after public input has eight parts and 32 subparts. It now takes up three and a half pages. No one outside of the Secretary of State's office saw any of those rules until they were adopted. It feels a little bit like a bait and switch to those of us who were involved in the process. And they don't stop there. Ms. Staiert testified earlier that the certification is

actually in Rule 21 and I note that there is a section in Rule 21 that was also added after the rule-making hearing in its entirety. It is Rule 21.4.16 and it substantially mirrors the language in Rule 11.9. Again, these are criteria that were not discussed at the rule-making hearing. These are criteria that were added after everyone objected to a single uniform voting system and were added in the certification criteria as well as the approval criteria. For your edification in case you don't have it in front of you, digital ballot adjudication is now a certification standard. You may recognize this, it's substantially the same as what's in Rule 11.9.3 (g) and has simply been rewritten into section 21 of the rules. Ballot scanners, automatic document feeders, are required by certification criteria and you'll see automatic document feeders actually show up four different times in these rules. They didn't show up at all in the proposed rules and now they show up four times as a consideration criteria under Rule 11.9.3 (g) (2), as minimum requirements for approval under Rule 11.9.4, and they show up again under Rule 11.9.5. All of those require an automatic document feeder. I would like to say why that's the case, why it shows up four times, but I don't know. This was never discussed. None of us outside of the Secretary of State's office had any idea why these showed up.

Representative Foote said I'm going to ask you a question and I'm not asking you to go back and repeat everything that you've said, but I think your testimony gets us closer to the heart of the matter of what we're supposed to be analyzing as part of the Committee on Legal Services which is whether or not the rule fits under the statute. I'd like to try to restate what you're saying just so I have it clear in my mind. I think what you're saying is that you're not disputing that the Secretary of State has the discretion to certify these machines, what you're saying is that the Secretary has applied the minimum standards a little too restrictively. Is that a fair summary of what you're saying about that? Mr. Pratt said that is a fair summary. I would add the Secretary of State has chosen a system and these rules are designed to make everyone either buy that system or a substantially similar system and that is not authority that we see. When you have the context, although he does have broad rule-making authority, contextually there are bounds to that authority and who selects a system seems to clearly rest with the local jurisdictions that will buy those systems.

Senator Scheffel asked can you help me with timing here because one of the tough spots we're in is that our jurisdiction is limited to the issue of whether or not the rule making is under the Secretary of State's broad authority and so it sounds like your acknowledging that it is and yet you bring in the timing issues. You talk about the Secretary not necessarily having the right to certify one system versus another and then you bring in the separate issue that potentially there's a HAVA violation here that I think you were trying to clarify in response to Representative Foote's question. Those are interesting questions about

whether the battle for a vendor like Hart is not yet ripe. It strikes me that that's the stuff of lawsuits. HAVA violations are certainly beyond the purview of this Committee but may very well be the subject of a separate lawsuit. Same with the intended or unintended direct or indirect result of multiple certifications or lack of certifications or the failure of Hart to be able to qualify for certification, again, that's all prospective. The certification battle, if you will, for Hart is ongoing and it's not ripe before this Committee. Am I missing something there? Mr. Pratt said no, that's correct. Those issues, as Ms. Staiert's testimony pointed out, are in the process of certification. It may have been a little disingenuous to say that they're not aware of anyone wanting other systems or that no one has tried to buy the other systems. We're all aware that they have not been certified and that we can't buy them until they're certified. So to say that no one has tried to buy any other systems, well that's because there's no point in trying to buy it yet. As far as the HAVA issue, the way I understand the law, the Secretary of State has broad authority to make rules regarding the purchase and certification of electronic and electromechanical voting systems but that authority is limited to setting minimum standards which as I testified are standards below which a system cannot properly conduct an election in Colorado. HAVA has set some standards and our statute sets standards for what a system must be able to do and the Secretary is allowed to make rules that reflect that. This rule making that has been proposed goes far beyond that, far beyond those minimum standards established both in our statutes and in HAVA.

8:37 a.m. – David Wunderlich, Assistant County Attorney, Jefferson County, testified before the Committee. Mr. Wunderlich said in the interest of expediency I will save this Committee from repeating much of what Mr. Pratt just said which I had also intended to say. I'd just like to emphasize a couple points about the authority granted to the Secretary of State under the statutory scheme regarding electronic voting systems. The rules in 11.9 address the Secretary of State's approval of systems and as you've heard today that's a different process than certification of systems. Sections 1-5-611 and 1-5-615, C.R.S, set forth lists of requirements for certification of voting systems. Without these requirements being met the electronic voting systems shall not be certified by the Secretary of State and I think everybody here agrees with that. If you look at the specific grant of rule-making authority in section 1-5-616, C.R.S., subsection (4) says that the Secretary of State shall adapt the standards for certification of electronic or electromechanical voting systems established by rule pursuant to subsection (1) of that section to ensure that new technologies that meet the requirements for such systems are certified in a timely manner and available for selection by political subdivisions. The crux of that section is that the minimum standards that the Secretary of State is empowered to make regarding electronic voting systems are standards for certification, not standards for approval, and therefore the standards for approval that the Secretary of State

has set forth in Rule 11.9 are not made under the authority granted to the Secretary of State under section 1-5-616, C.R.S. The Secretary of State shall adapt his standards for certification to meet the requirements that are set forth in the statute. There's a list of requirements in the statute. By taking an authority to make rules that have exceeded the list in the statute, the Secretary of State has exceeded those requirements. I think the point that Mr. Pratt made regarding section 1-5-608.5 (3), C.R.S., that if a system is federally tested and certified the Secretary of State shall certify it and approve its purchase for political subdivisions is not a discretionary requirement, it is a mandatory requirement. These systems under the statutory scheme are clearly to be diverse in nature, from multiple sources, and the Secretary of State is, to call back a comment that was made earlier in the session, acting as a gatekeeper and not a policy setter for these systems. As far as the policy in questions of conflict and law being one of policy rather than authority, I think it's informative for this Committee to consider that these rules are made under the APA and section 24-4-103, C.R.S., requires that no rule shall be made in conflict with an existing statute. Now that specifically said, it doesn't have to be a direct conflict and I think if this Committee were to read the statutory scheme of part 6 of article 5 of title 1, C.R.S., as a whole it would be clear to this Committee that the legislative intent is for political subdivisions to select their own voting systems. To impose a regulatory scheme that limits that selection severely to only one at the moment and potentially two out of the whole milieu of vendors that are available nationwide would serve to defeat that intent.

Senator Scheffel said if you could just clarify the same question we were trying to drill down before. What you're asserting is that the rules ultimately would result in an overreach or violation going beyond the statute, but again it feels like there's almost a ripeness issue. How do you deal with the issue that there are certifications in process? There's discussion that there will be multiple certifications or at least opportunity for that and so what you assert we don't know for sure and again that may be the proper subject of further appeals or lawsuits, but our jurisdiction is so narrow here, how do we reconcile that. Mr. Wunderlich said I think that the response to that question is in two parts. You accurately identify that there is a ripeness issue for a property interest lawsuit about an improper denial of certification. Obviously that's not the concern of the counties. We're concerned with preserving our rights to select a system prospectively. Unfortunately, we have to do that before a system is denied whether properly or improperly and I think that the way that we address that is to consider whether the Secretary of State actually has authority to set the standards for approval of purchase rather than certification. These are two separate processes the statute sets for the requirements for certification. It requires that the Secretary of State adopt his rules to make sure the voting systems meet those certification requirements and then further requires that the

Secretary of State approve the purchase of any voting system that meets those requirements. If the system meets the requirements the system shall be certified. Once the system is certified the Secretary of State shall approve the purchase application. The Secretary of State has inserted a secondary level of rules about which systems shall be approved for purchase and nothing in the statute gives him the authority to do that. Senator Scheffel asked so you represent Jefferson County? Mr. Wunderlich said yes. Senator Scheffel asked what system are you trying to purchase and have certified and where are you at in that process? Mr. Wunderlich said as Ms. Staiert identified earlier, Jefferson County currently has temporary approval to utilize a new configuration of the ES&S system that was previously piloted for the 2015 election. Jefferson County has not yet chosen which vendor we'd like to move forward with for 2017. As Ms. Staiert also identified, statewide there is an issue of obsolete technology. One of the reasons they undertook the pilot statewide program was to evaluate options for the state moving forward. We have a new requirement for risk limiting audits which is a statistical audit for voting accuracy that becomes effective in 2017. Many of the state's existing systems were going to need to be replaced by 2017 regardless, including Jefferson County's. The ES&S system we piloted does qualify for that. We're not necessarily desirous of purchasing that system in 2017. We'd have to undergo a procurement process. It's Jefferson County's position that we'd like to preserve our rights to select the system we deem appropriate based on our own needs.

8:46 a.m. – Richard Kaufman of Ryley Carlock & Applewhite, on behalf of Election Systems & Software LLC and Hart InterCivic, Inc., testified before the Committee. Mr. Kaufman said I represent ES&S and Hart which are two of the vendors that provide voting systems here in Colorado and have done so for years. We are testifying against this rule and let me first just second what Mr. Klotz, Mr. Pratt, and Mr. Wunderlich said. I think Senator Scheffel's questions about what the authority is of the Secretary of State are key here. I'm not going to go over everything everybody else said but I think if we look back to 2009 there was a bill passed, H.B. 09-1335, and that is the bill that changed part 6 of article 5 of title 1, C.R.S., and I think the Secretary of State has relied on section 1-5-623, C.R.S. The purpose of that bill was that at that point and time technology was advancing and a lot the counties had older systems and what the legislature did was say that between 2009 and 2014 nobody can purchase a new system unless it's approved by the Secretary of State, specifically giving the Secretary of State that authority because they wanted him to evaluate what was going on with the new technology and systems. Well we're now in 2016, past the end date, and I think it was Secretary Gessler who set up this committee which ended its deliberation in December. But there's nothing in that amendment from 2009 that changes the system that we had which was that multiple vendors could be approved, certified, and they could sell their systems

to the counties because the counties pay for this, not the state. This is on the counties' backs. To give an example, during the PERC deliberations for these vendors, including ES&S and Hart, they had to provide what it would cost to provide a system statewide. ES&S came in at $5 million and Hart came in at $7.5 million. Dominion came in at $9.5 million and Clear Ballot came in at $13 million. So if forced into one system the cost to the counties will be exponential and they bear the full cost, it's not part of the state budget. The question is does the Secretary of State have the authority to limit to one vendor. I don't believe he does because first of all the system has never been set up that way. The statutory changes made in 2009 have never changed that authority and as Mr. Klotz pointed out specifically this Rule 11.9 actually eliminates ES&S and Hart in many instances. They just can't meet the qualifications even though their systems under the general rules that have always been applied before do meet the requirements in Colorado to conduct an election. There is nothing in the law that specifically says the Secretary of State can write rules that eliminate three out of four vendors. There's nothing in statute and it's never been that way in this state. I don't think any of the changes from 2009 would allow that either. In fact, the statutory scheme has always been implemented so that there could be multiple vendors in the state and as Mr. Pratt testified different counties need different systems. Smaller counties need less expensive systems for the simple reason they have fewer voters. These rules as written now pretty much ensure that Dominion is going to be the only vendor in Colorado so we would ask you to overturn this rule.

Senator Scheffel said I appreciate where you are going and your passionate testimony, but the use of the terms "pretty much eliminates other vendors" – if the effect of this rule is that it actually eliminates all other vendors, if the counties are forced into one system, then the result will be greater expense. It feels like what we're being asked to do is disqualify this rule based on a prospective result for an injury that has not yet matured. The reality is we sit here today and we don't know that because the process is ongoing. Help me with that line, you're aware of it and you must understand what we're struggling with here. Mr. Kaufman said I have a letter from Secretary Williams dated December 22, 2015, when he accepted PERC and let me just quote, "while I respect the committee's majority view regarding the relative advantages and disadvantages of selecting one or multiple voting system providers in the future, I have conditionally decided to select a single voting system for use in Colorado. This aspect of my decision is based on numerous factors including 1) my office can negotiate more quickly the most favorable pricing, support level agreements, warranties, and software and hardware licenses with a sole provider on a statewide basis, 2) transitioning to a single voting system on a statewide basis will enable my office to better support counties and counties to better support one another…and 3) transitioning to a single voting system on a statewide basis

will create administrative efficiencies in elections divisions of my office including…" and then he lists several of those. To me the intent is clear that the Secretary of State wants to go to a single voting system, Dominion, and then that gets back to the question is there legal authority to do that and I think all the testimony from the counties and now from Hart and ES&S is that he does not have that authority, that the statutes have always contemplated multiple vendors, and that a rule that is written with specific requirements that eliminates all but one vendor is beyond his authority.

Representative Foote said we are to a point now where there could be a motion from someone from the Committee. One appropriate motion could be a motion to repeal this rule. Another option that this Committee has is to take no action. At this point I would open it up for any brief discussion or a motion. If I hear no motion I will conclude we are taking no action. Seeing no discussion and hearing no motion I will conclude that the Committee wishes to take no action on this rule at this time.

8:55 a.m. – The Committee addressed agenda item 2 – Approval of HB 16-1257 by Representative McCann; also Senator Scheffel - Rule Review Bill.

8:55 a.m.

Hearing no further discussion or testimony Representative McCann moved HB 16-1257 to the committee of the whole with a favorable recommendation. Representative McCann said I think the issue that we were waiting to decide was the issue we just decided because otherwise the other rules we have already discussed in committee so at this point we can move this Rule Review Bill forward. Senator Steadman seconded the motion. The motion passed on a vote of 9-0 with Representative Dore, Senator Johnston, Representative McCann, Senator Roberts, Senator Scott, Senator Steadman, Representative Willett, Senator Scheffel, and Representative Foote voting yes.

8:57 a.m.

The Committee adjourned.